# STATE OF MICHIGAN

# COURT OF APPEALS

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HENRY D. COLE,

Plaintiff-Appellant,

v

DEPARTMENT OF CORRECTIONS and DEBORAH QUINLAN,

Defendants-Appellees,

and

MICHAEL ABBEY,

Defendant.

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UNPUBLISHED
September 12, 2006

No. 258053
Genesee Circuit Court
LC No. 03-075608-CL

Before: Owens, P.J., and Kelly and Fort Hood, JJ.

PER CURIAM.

Plaintiff appeals as of right from an order of the circuit court granting summary disposition in favor of defendant Department of Corrections (DOC). The court also granted summary disposition to defendant Deborah Quinlan, plaintiff's supervisor at the DOC. We affirm.

This is a racial discrimination case arising out of plaintiff's employment with the DOC. At the time of the actions relevant to this complaint, plaintiff was a supervisor of other probation officers. An audit of his employees' files occurred. The individual performing the audit, Peggy Patten, orally notified plaintiff of discrepancies, but allegedly concluded that the audits were satisfactory. Nonetheless, she reported the discrepancies to management. Plaintiff's superior, Michael Abbey, sent him correspondence indicating that there were discrepancies and asked plaintiff to address the problems and report back. Plaintiff did not immediately respond, but rather, questioned why the inquiry was raised when the audit had been resolved as "satisfactory." Plaintiff also raised these issues with his immediate supervisor, defendant Quinlan. Plaintiff admitted that he did not immediately comply with the request for information. Instead, he questioned why the inquiry addressed the caseload of three African-Americans agents when the work of all of his employees had discrepancies. He also believed that an inappropriate procedure had been used in light of the transition to a computer system, and that his supervisor should take

the issue up with the auditor, Patten, not the employees. After plaintiff complained regarded the requests and treatment, an internal investigation was conducted, but dismissed. Ultimately, a disciplinary conference was held wherein plaintiff was advised that he needed to complete his assignments to bring his performance to a satisfactory level. Plaintiff did not comply, but rather, requested a demotion, and his request was granted. Plaintiff filed this lawsuit alleging racial discrimination and retaliation.

The trial court granted defendant Quinlan's motion for summary disposition because it found that under *Jager v Nationwide Truck Brokers, Inc*, 252 Mich App 464; 652 NW2d 503 (2002), overruled by *Elezovic v Ford Motor Co*, 472 Mich 408; 697 NW2d 851 (2005), plaintiff could not sue Quinlan, plaintiff's supervisor, in her individual capacity. The trial court granted the DOC's motion for summary disposition because it concluded that plaintiff had failed to show that he suffered an adverse employment action, which is required to establish his claims under the Elliott-Larsen Civil Rights Act (CRA), MCL 37.2101, *et seq*., for racial discrimination and retaliation. Plaintiff argues that he suffered an adverse employment action because he was subjected to harassment in the form of disciplinary action, which eventually led to his request for a demotion.

We review the trial court's decision on a motion for summary disposition de novo. *Dressel v Ameribank*, 468 Mich 557, 561; 664 NW2d 151 (2003). A motion brought under MCR 2.116(C)(10) tests the factual support for the claim. *Id*. A trial court may grant summary disposition under MCR 2.116(C)(10) when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Royal Prop Group, LLC v Prime Ins Syndicate, Inc*, 267 Mich App 708, 713; 706 NW2d 426 (2005). In ruling on a motion under MCR 2.116(C)(10), the trial court must view the pleadings, affidavits and other documentary evidence in a light most favorable to the nonmoving party. *Id*. When reviewing a motion for summary disposition brought under MCR 2.116(C)(7), this Court considers affidavits, depositions, admissions, and any other documentary evidence, as long as these materials would be admissible at trial. *Pusakulich v City of Ironwood*, 247 Mich App 80, 82; 635 NW2d 323 (2001). Further, this Court accepts the contents of the complaint as true unless the moving party contradicts the plaintiff's allegations with documentary evidence. *Id*. A motion under MCR 2.116(C)(8) tests the legal sufficiency of a claim by the pleadings alone; no documentary evidence is considered. *Mable Cleary Trust v Edward-Marlah Muzyl Trust*, 262 Mich App 485, 491; 686 NW2d 770 (2004). All factual allegations in support of the claim, as well as any reasonable inferences or conclusions that can be drawn from the facts, are accepted as true and are construed in the light most favorable to the nonmoving party. *Alan Custom Homes, Inc v Krol*, 256 Mich App 505, 508; 667 NW2d 379 (2003).

MCL 37.2202(1)(a) states in relevant part:

> (1) An employer shall not do any of the following:
>
> (a) Fail or refuse to hire or recruit, discharge, or otherwise discriminate against an individual with respect to employment, compensation, or a term, condition, or privilege of employment, because of . . . race . . . .

In employment discrimination cases under the CRA where there is direct evidence of racial discrimination, the plaintiff may proceed and prove the unlawful discrimination in the same manner as in any other civil case. *Hazle v Ford Motor Co*, 464 Mich 456, 462; 628 NW2d 515 (2001). However, if there is no direct evidence of racial discrimination, then the plaintiff must rely on the four steps set forth in *McDonnell Douglas Corp v Green*, 411 US 792; 93 S Ct 1817; 36 L Ed 2d 668 (1973), to establish a prima facie case of race discrimination. *Id*. Under the *McDonnell Douglas* analysis, the plaintiff must show that (1) he belongs to a protected class, (2) he suffered an adverse employment action, (3) he was qualified for the position, and (4) he suffered the adverse employment action under circumstances inferring discrimination. *Lytle v Malady* (*On Rehearing*), 458 Mich 153, 172-173; 579 NW2d 906 (1998). If the plaintiff establishes a prima facie case, then there is a rebuttable presumption of discrimination and the burden shifts to the employer to articulate and present admissible evidence in support of a "legitimate nondiscriminatory reason" for its decision. *Id*. at 173. The burden then shifts back to the plaintiff to prove by a preponderance of the evidence that the reason offered by the defendant was a mere pretext for unlawful discrimination. *Id*. at 173-174.

Further, section 701 of the CRA prohibits retaliation against persons who either oppose violations of the act or who have filed a complaint under the act. MCL 37.2701. A plaintiff must show the following to establish a prima facie case of retaliation under the CRA: (1) that the plaintiff engaged in a protected activity; (2) that this was known by the defendant; (3) that the defendant took an employment action adverse to the plaintiff; and (4) that there was a causal connection between the protected activity and the adverse employment action. *Meyer v Center Line*, 242 Mich App 560, 568-569; 619 NW2d 182 (2000).

Demonstrating that he suffered an adverse employment action is a necessary element of both plaintiff's race discrimination and retaliation claims. *Wilcoxon v Minnesota Mining & Manufacturing Co*, 235 Mich App 347, 362; 597 NW2d 250 (1999). "[I]n order for an employment action to be adverse for purposes of a discrimination action, (1) the action must be materially adverse in that it is more than 'mere inconvenience or an alteration of job responsibilities,' and (2) there must be some objective basis for demonstrating that the change is adverse." *Id*. at 364 (internal citation omitted). "Although there is no exhaustive list of adverse employment actions, typically it takes the form of an ultimate employment decision, such as 'a termination in employment, a demotion evidenced by a decrease in wage or salary, a less distinguished title, a material loss of benefits, significantly diminished material responsibilities, or other indices that might be unique to a particular situation.'" *Peña v Ingham Co Rd Comm*, 255 Mich App 299, 312; 660 NW2d 351 (2003). When determining if an adverse employment action exists, "courts must keep in mind the fact that '[w]ork places are rarely idyllic retreats, and the mere fact that an employee is displeased by an employer's act or omission does not elevate the act or omission to the level of a materially adverse employment action.'" *Id*.

Plaintiff relies on the Sixth Circuit case of *White v Burlington Northern & Santa Fee R Co*, 364 F3d 789, 801(CA 6, 2004) for the proposition that an adverse employment action does not have to be an ultimate employment decision. While this Court considers federal case law interpreting Title VII to be persuasive authority on issues brought under the CRA, it is not binding. *Peña*, *supra* at 311 n 3, citing *Krohn v Sedgwick James of Michigan, Inc*, 244 Mich App 289, 297 n 4; 624 NW2d 212 (2001). Further, we note that while the *White* Court did expand the definition of an adverse employment action to include decisions that are not "ultimate

employment decisions," it also reaffirmed its definition set forth in *Kocsis v Multi-Care Mgt, Inc*, 97 F3d 876, 885-887 (CA 6, 1996), which requires the plaintiff to show that he or she "suffered a materially adverse change in the terms of [his or] her employment." *White, supra* at 797, 799. Therefore, plaintiff must still show that the action taken against him was somehow materially adverse to his employment.

Plaintiff first contends that the fact that he was given negative evaluations and improper write-ups is a sufficient adverse action for purposes of establishing his prima facie case. However, the formal counseling memo and the interim service rating that plaintiff received were not materially adverse to his employment. They had no negative effect in and of themselves. Rather, they merely notified plaintiff that if he did not comply with the requirements set forth in them, then adverse action, such as demotion or termination, could occur. There was no loss of compensation or benefits as a result of them, and they did not change plaintiff's employment. Therefore, we conclude that plaintiff did not suffer an adverse employment action by being given the negative evaluations and write-ups.

Plaintiff also contends that defendant's threats of termination are an adverse employment action. But, again, any threats of termination did not change plaintiff's employment. Moreover, plaintiff was not immediately threatened with termination. Rather, he was repeatedly asked to submit the required information. In his deposition, plaintiff admitted that he did not complete the form until January or February 2002. Thus, the contacts to fulfill compliance with the work request did not constitute adverse employment action. On the contrary, it was plaintiff's own request for demotion that changed his employment status.

Plaintiff also argues that the fact that he was the only supervisor that was not left in charge of the office in his supervisor's absence is sufficient to establish an adverse employment action. However, this Court has held that a mere alteration in job duties is not sufficient to show an adverse employment action for purposes of establishing a prima facie case. *Wilcoxon, supra* at 364. Therefore, plaintiff did not establish that he suffered an adverse employment action by not being asked to run the office in his supervisor's absence.[1]

Plaintiff also alleges that sufficient information was presented to create genuine issues of material fact to preclude summary disposition. However, a factual issue must be established by

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[1] Plaintiff cites *Logan v Denny's, Inc*, 259 F3d 558 (CA 6, 2001), as supporting his argument that an adverse employment action may be demonstrated by showing that the employer engaged in acts to badger, harass, or humiliate the employee, which were calculated to encourage the employee's resignation. Again, the decision *Logan* is not binding on this Court. *Peña, supra* at 311 n 3. Further, plaintiff' reliance on *Logan* is misplaced. *Logan* merely set forth the factors to be considered under a constructive discharge analysis when determining if a reasonable person in the plaintiff's shoes would have felt compelled to resign. *Logan, supra* at 569. It did not hold, as plaintiff asserts, that badgering, harassing, or humiliating an employee in and of itself was an adverse employment action. Therefore, we conclude that the trial court did not err in finding that plaintiff did not suffer an adverse employment action for purposes of establishing his prima facie cases of race discrimination and retaliation.

admissible, documentary evidence, and mere conclusory allegations, without more, are insufficient to create a factual issue. *Maiden v Rozwood*, 461 Mich 109, 119; 597 NW2d 817 (1999); *Quinto v Cross & Peters Co*, 451 Mich 358, 362; 547 NW2d 314 (1996). Plaintiff alleged that discrepancies were discovered in the work product of all of his employees following the audit, but only African-American employees were investigated. Plaintiff failed to bring forth documentary evidence to support the blanket assertion. Defendant produced evidence that, with regard to plaintiff's employees, only three had discrepancies that were discovered during the audit.[2] Plaintiff further alleged that he was the only supervisor investigated, but he admitted that he had no personal knowledge of the review of other supervisors. Indeed, a DOC representative testified that there was at least one other supervisor who was notified of discrepancies discovered during the audit process. Plaintiff's conclusory and blanket assertions are insufficient to create a factual issue.

Finally, while the reasoning offered in support of the trial court's grant of summary disposition to defendant Quinlan was error in light of the reversal of the decision relied on by the trial court, the trial court's error does not require reversal here because plaintiff cannot establish his prima facie case for retaliation. *H A Smith Lumber & Hardware Co v Decina* (*On Remand*), 265 Mich App 380, 385; 695 NW2d 347 (2005), quoting *Taylor v Laban*, 241 Mich App 449, 458; 616 NW2d 229 (2000) ("This Court 'will not reverse when the trial court reached the right result for the wrong reason.'").

Affirmed.

/s/ Donald S. Owens
/s/ Kirsten Frank Kelly
/s/ Karen M. Fort Hood

[2] Patten testified two of plaintiff's employees had only minor discrepancies. Indeed, only one employee, Craig Justice, had a substantial number of inconsistencies. Ultimately, Justice was discharged after being convicted of a crime.